BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHERYL HAMILTON	)	
Claimant	)	
	)	
VS.	)	
	)	
MIDWEST HEALTH SERVICES, INC.	)	
Respondent	)	Docket No. **1,060,671**
	)	
AND	)	
	)	
UNITED WISCONSIN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent) request review of the August 22, 2012 Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders. Bruce A. Brumley, of Topeka, Kansas, appeared for claimant. Bill W. Richerson, of Overland Park, Kansas, appeared for respondent.

The record on appeal is the same as that considered by Judge Sanders and consists of the August 21, 2012 preliminary hearing transcript with exhibits and all pleadings contained in the administrative file.[1]

ISSUES

Judge Sanders found claimant sustained injury by repetitive trauma with an April 25, 2012 injury date. Judge Sanders ordered medical treatment with Dr. Laurel Vogt and temporary total disability benefits from May 8, 2012 forward.

Respondent argues that Judge Sanders erred by finding claimant sustained injury by repetitive trauma. Respondent argues claimant sustained personal injury by accident in February and March 2012 and therefore notice was not timely when provided on

[1] The record does not include the August 10, 2012 discovery deposition of Barry McGinnis, which was not offered by either party or stipulated into evidence.

April 25, 2012. Respondent also argues Judge Sanders erred by awarding temporary total disability benefits if claimant is also receiving unemployment benefits.

Claimant requests that Judge Sanders' ruling be affirmed. Claimant also asserts respondent's appeal was untimely.

Respondent requests review of Judge Sanders' ruling on the following issues:

(1) is claimant's injury due to distinct accidents occurring in February and March 2012 as opposed to being due to repetitive trauma through April 25, 2012;

(2) did claimant provide timely notice for her February and March 2012 accidental injuries;

(3) did Judge Sanders err by ordering payment of temporary total disability benefits if claimant is concurrently receiving unemployment benefits.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant's job involved transporting patients in a large van to and from medical appointments. The majority of people claimant transported were in wheelchairs. A mechanical lift gets wheelchair patients into the van. Claimant did not lift patients.

Claimant began to experience symptoms in her right shoulder starting in late-February 2012. She was opening a van door with a handle, similar to an old bus, when a strong wind caught the door and yanked her right arm away from her. Claimant was not sure if she was injured, but her arm was sore almost like a cramp and a burn. She did not seek medical treatment, assuming her symptoms would go away, but her symptoms did not dissipate. Claimant continued working. A second similar incident occurred in the first or second week of March 2012 which also did not necessitate medical attention. Claimant's pain did not completely go away. Following both events, claimant's symptoms went "back and forth," with some good days and some bad days.[2]

As she continued to work, claimant's pain worsened and spread into her neck, shoulder blade, chest and arm. Claimant attributed the worsening to her workload, including pushing people in wheelchairs and gurneys. Such tasks required greater force when the people were heavy, when on soft surfaces, around corners, up ramps or when

[2] P.H. Trans. at 12-13.

a wheelchair would get stuck in a doorway. She also testified that opening and closing the heavy van door more than 10 times per day would wear her down over her shift.

Claimant's supervisor, Barry McGinnis, testified claimant would only need to open the van door once or twice per shift. At some unknown time, claimant told Mr. McGinnis to look at the van door because she was having problems with the door. Mr. McGinnis tried to adjust the van door following claimant's complaints. Mr. McGinnis testified that he and two unnamed drivers did not complain of problems opening or closing the van door.

Claimant advised respondent about her shoulder injury on April 25, 2012, because her pain was worse and she decided she needed medical attention. Claimant wrote in an "Employee Incident Report" that she was injured in February.[3]

Respondent sent claimant to Dr. Laurel Vogt at St. Francis. Claimant told Dr. Vogt that her onset of symptoms occurred in February, as described above, and additional injuries and incidents aggravated the condition. Claimant further told Dr. Vogt that her right shoulder pain was progressively worsening, especially for the last three or four weeks, due to using her right arm, including pushing wheelchairs and gurneys. Dr. Vogt opined "the cause of this problem is related to work activities."[4] Dr. Vogt provided light-duty restrictions.

Claimant attempted light duty on Thursday, April 26, 2012, which did not involve pushing people in wheelchairs and gurneys, but she nonetheless had pain from driving and folding up and securing walkers.

Claimant's May 1, 2012 recorded statement noted she was "steadily getting worse since the first [incident]" and was injured from constant pushing and pulling wheelchairs and gurneys.[5]

Respondent was unable to accommodate claimant after May 7, 2012.

Dr. Prostic opined claimant sustained repetitious minor trauma from forcefully pushing and pulling a van door lever and assisting clients into the van through her last day worked in April 2012. Dr. Prostic indicated that such repetitious trauma was the prevailing factor in her injury and need for medical treatment.[6] His report did not mention specific traumatic events in February or March 2012.

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[3] *Id*. at 35-36, Resp. Ex. B.

[4] *Id*., Cl. Ex. 4 at 2.

[5] *Id*., Cl. Ex. 2 at 3-4.

[6] *Id*., Cl. Ex. 1 at 2.

An unemployment hearing was held August 15, 2012. The corresponding decision stated claimant advised respondent about her injuries occurring in February and March 2012. The decision states claimant did not think such injuries required medical attention at that time. Further, the decision states claimant said her pain became increasingly worse over time, causing her to seek treatment on April 25, 2012. The August 16, 2012 unemployment decision stated claimant was qualified to receive unemployment benefits, pending remand to the U.I. Call Center to address claimant's ability to work without restrictions.[7]

Amber Hermreck, respondent's human resources director, attended claimant's unemployment hearing. Ms. Hermreck testified claimant never complained about being hurt from pulling wheelchairs and gurneys and she never complained about any causes for her shoulder pain other than the February and March incidents. Ms. Hermreck testified the unemployment hearing focused on whether any employee misconduct had occurred.

Dr. Vogt's August 15, 2012 letter stated claimant's original injury occurred in February 2012 when wind caught the van door and yanked her arm. Dr. Vogt also noted claimant's original injury was exacerbated by repeated use of the arm and lack of rest. Dr. Vogt found the prevailing factor to the injury was the wind gust.[8]

PRINCIPLES OF LAW

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[9]

K.S.A. 2011 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

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[7] *Id.*, Cl. Ex. 6 at 1-2.

[8] *Id.*, Resp. Ex. E.

[9] K.S.A. 2011 Supp. 44-501b(c).

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 44-551(i)(1) states, in part, "All . . . preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation."

ANALYSIS

Claimant's pain level in February and March 2012 was a "2" on a 0-10 scale.[10] Claimant testified her symptoms were intermittent, although they never went away. Claimant did not seek medical attention for the February and March 2012 incidents. This Board Member views such events as causing relatively minor pain complaints. If these events resulted in significant injury, claimant would be expected to have sought medical attention, but she did not do so. Obviously, claimant did not have a diagnosed medical condition or restrictions. There is no showing claimant had difficulties or was unable to perform any of her work as a result of the February and March 2012 accidental injuries.

This Board Member does not find the February or March 2012 events to be the prevailing factor in causing claimant's injury or need for medical treatment. Rather, such events seem to be part and parcel of claimant's repetitive activities that caused her injury. The record supports Judge Sanders' conclusion that claimant was injured by repetitive trauma through April 25, 2012.

Claimant continued to perform her normal job duties and her right arm and shoulder worsened through April 25, 2012. Claimant testified her pain level was a "10" on April 25, 2012.[11] Claimant's pain level being so high is questionable based on Dr. Vogt's report stating claimant's pain level was a "5-6." In any event, the report shows claimant progressively worsened due to pushing wheelchairs and gurneys subsequent to her initial injury.[12] The claimant's recorded statement corroborates that "constant pushing and pulling of wheelchairs and gurneys" made her worse. This Board Member is convinced claimant's right shoulder injury was incurred as the result of her repetitive work activities.

Dr. Vogt's August 15, 2012 letter stated claimant's original injury in February was exacerbated by repeated use of the arm and lack of rest. Dr. Vogt opined the prevailing

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[10] P.H. Trans. at 16-17.

[11] P.H., Trans. at 16-17.

[12] P.H. Trans., Cl. Ex. 4 at 2.

factor in claimant's injury was a gust of wind. Dr. Vogt's letter on causation differs from her initial report. Dr. Vogt's April 25, 2012 report noted claimant's pain increased secondary to pushing wheelchairs and gurneys and the "cause of this problem is related to work activities." Dr. Vogt did not initially indicate that claimant's injury was due to a single event involving a gust of wind, but was rather due to multiple work activities. Dr. Vogt's mention of an "original" injury implies that more than one injurious event occurred.

Considering the entire record, this Board Member adopts Dr. Prostic's prevailing factor opinion, primarily because it is consistent with claimant's history to Dr. Vogt that pushing wheelchairs and gurneys caused her to worsen, claimant's recorded statement to the same effect, as well as claimant's testimony.

Claimant's failure to mention the repetitive nature of her injury at her unemployment hearing is of minimal significance. The focus of such hearing, at least according to Ms. Hermreck, concerned whether employee misconduct occurred.

The April 25, 2012 "Employee Incident Report" in which claimant only listed a February accident date is not a compelling piece of evidence considering claimant provided a more-detailed account of her injuries to Dr. Vogt that very day.

Judge Sanders did not err by ordering payment of temporary total disability benefits during a time claimant was also receiving unemployment benefits.[13] There is no proof claimant was awarded or received unemployment benefits. The unemployment decision notes that the U.I. Call Center needed to address whether claimant was able to work without restrictions. Whether such determination was made is unknown. In any event, Judge Sanders' order states claimant is not to receive temporary total disability benefits and unemployment benefits at the same time. Additionally, a dispute over TTD is not an issue over which the Board takes jurisdiction on appeal from a preliminary hearing.

Respondent's appeal was timely. Judge Sanders' preliminary hearing order was dated August 22, 2012. The effective date of such order was August 23, 2012. Not including weekends or holidays, 10 days later would be September 7. Respondent fax filed an application for review on September 6 at 8:46 p.m. K.A.R. 51-17-2(g)(6) states applications received after 5:00 p.m. "shall be deemed to have occurred on the next day." Accordingly, the application for review was received on September 7 and was timely.

CONCLUSION

This Board Member finds claimant's relatively minor injuries in February and March 2012 are part of her claim for repetitive injury through April 25, 2012. Notice provided that very day was timely. The prevailing factor in claimant's injury and need for medical

[13] See K.S.A. 2011 Supp. 44-510c(b)(4).

treatment was her repetitive trauma. Judge Sanders did not exceed her jurisdiction or err in awarding temporary total disability benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

WHEREFORE, the undersigned Board Member finds that the August 22, 2012 Preliminary Hearing Order entered by Judge Sanders is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

e: Bruce A. Brumley, Attorney for Claimant
Bill W. Richerson, Attorney for Respondent and Insurance Carrier
Rebecca Sanders, Administrative Law Judge

[14] K.S.A. 44-534a.

[15] K.S.A. 2011 Supp. 44-555c(k).